United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

16-6

820

IN THE
UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 23,564

UNITED STATES OF AMERICA

Appellee

v.

CLARENCE WILSON

Appellant

Appeal From The United States District Court
For The District of Columbia

BRIEF FOR APPELLANT

John L. Ridge, Jr.
1511 'K' Street, N.W.
Washington, D.C., 20005

Counsel for Appellant
(appointed by the Court)

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TABLE OF CASES

Cases chiefly relied upon are marked by asterisks.

REFERENCES TO RULINGS

Order of Judge Robinson dated September 22, 1969 denying defendant's motion for a new trial.

QUESTIONS PRESENTED

In the opinion of appellant, the following issues are presented:

1. Should a new trial have been granted when a witness became available who, by affidavit, admitted his own involvement in the actions for which appellant was convicted and who absolved appellant of any participation therein.

2. Whether a delay of more than sixteen months between arrest and trial, coupled with the absence at trial of a co-defendant who would have testified that he alone committed the unlawful acts against the complaining witness, constitutes a deprivation of appellant's constitutional right to a speedy trial.

This case is also before the Court as No. 22,329, which has been consolidated with this case for all purposes.

STATEMENT OF THE CASE

The procedural and factual background of this case up to and including conviction are set forth in the briefs filed in No. 22,329, which has been consolidated with this case. In No. 22,329 appeallant seeks reversal of his conviction for denial of his right to a speedy trial. At the time of his trial, appellant moved for dismissal of the indictment and alleged that he was prejudiced by the absence of the fugitive co-defendant, Willie McDuffie. (Tr. No. 2, p.3)

In the instant case, appellant seeks review of the trial Court's denial of his motion for a new trial based on newly discovered evidence.

While serving his sentence at Lorton Reformatory, appellant discovered that his co-defendant, Willie McDuffie, had been apprehended on a fugitive warrant and was also incarcerated at Lorton. He communicated that fact to his appointed counsel, who thereafter interviewed McDuffie and obtained a voluntary affidavit. (appellant's motion for new trial).

In his affidavit, McDuffie admits that he accosted the complaining witness and attempted to take money from him. However, he denies unequiv cally that appellant was in any way an accomplice in these actions and he corroborates the testimony given by appellant at the trial (Tr. No. 2, pp 120-124).

Based upon the foregoing, appellant filed a motion for a new trial and attached McDuffie's affidavit thereto. On September 22, 1969, the trial judge entered an order denying appellant's motion for a new trial

ARGUMENT

I

APPELLANT SHOULD HAVE BEEN GRANTED A NEW TRIAL

To obtain a new trial because of newly discovered evidence (1) the evidence must have been discovered since the trial; (2) the party seeking the new trial must show diligence in the attempt to procure the newly discovered evidence; (3) the evidence relied on must not be merely cumulative or impeaching; (4) it must be material to the

issues involved; and (5) of such nature that in a new trial it would probably produce an acquittal. Thompson v United States, 188 F2d. 652, 88 U.S. App. D.C., 235 (1951).

Appellant submits that the testimony of Willie McDuffie proffered by way of affidavit clearly meets the requirements of nos. (1), (3) and (4) above. With respect to appellant's diligence, the record indicates that McDuffie's whereabouts at the time of trial was unknown to both the government and the defense. As soon as appellant discovered that McDuffie had been apprehended, he notified his attorney.

The issue is therefore narrowed to a consideration of whether the testimony of McDuffie at a new trial would be likely to result in an acquittal of appellant. Appellant submits that it would and the trial judge abused his discretion by his denial of the motion.

The court below did not set forth its reasoning in opinion form, but its Order indicates that it simply accepted the prosecution witnesses' version of the events and rejected the testimony of appellant and McDuffie. It might be inferred from this that, in the opinion of the court, a jury would do likewise.

Appellant does not claim that the testimony of McDuffie would assure his acquittal. McDuffie's "confession" is by no means unqualified. Nevertheless, he does admit to those acts which are the crux of the government allegations and he confirms appellant's consistant claim that he was simply an unfortunate victim of fate, an innocent bystander at a quarrel between two drinking companions.

The test is not whether the trial judge finds such evidence persuasive. He must look at it through the eyes of a typical juror and ask himself whether such evidence, if effectively presented and bolstered by argument of a competent defense attorney, would be likely to cause him to entertain a reasonable doubt as to appellant's participation in the alleged crime.

It must be remembered that the testimony of the complaining witness with respect to his nocturnal wanderings (Tr. No. 2, pp 16-20) hardly discloses the type of sober citizen whose testimony would normally be entitled to great weight.

The testimony of the private security guard Mr. Littleton, is consistent with that of McDuffie and appellant.

It is admitted that appellant was on the scene and it was natural for the witness to assume that he was participating in the apparent assault upon Mr. Holliday. But the mere fact that appellant was there (Tr. No. 2, pp 50-51) is ambiguous in the circumstances of this case and a jury might well be persuaded to discount this evidence.

The testimony of the two Metropolitan Police officers, Dews and Chichester, does directly conflict with that of appellant and McDuffie. Dews stated the person standing in front of the complaining witness had an object in his hand and was holding it near the complainant's neck. The person holding the object was appellant and the object turned out to be a knife. (Tr. No. 2, pp 74,75).

The other officer, Private Chichester, stated on direct examination that appellant was standing two to three feet from Holliday and "had his arm extended in the vicinity of Mr. Holliday's face". (Tr. No. 2, p. 95). He made no mention of any "object" in appellant's hand except as an apparent after thought during cross examination (Tr. No. 2, pp 99,100).

The critical issue, therefore, is whether the testimony of McDuffie would be likely to raise a doubt

as to the accuracy of the prosecution's evidence that appellant played an active role in the crime. In this regard, if the case were re-tried, defense counsel might raise several questions: the witness Littleton apparently did not see appellant with his arm raised or with any object in his hand; the first words of Mr. Holliday to the police officers were "He robbed me. He robbed me". (Tr. No. 2, p 85) (emphasis supplied); appellant denied holding a knife and that it was found at his feet (Tr., No. 2, pp 124,125); no finger-prints were taken from the knife (Tr. No. 2, p 80).

There is no question but that the government presented a strong case; nevertheless it is entirely possible that the testimony of McDuffie would be sufficient to tip the balance in favor of appellant. It is conceivable that a person in McDuffie's position might be motivated by something other than pure altruism in his efforts to exonerate appellant, but no such reason comes immediately to mind. Even though McDuffie's affidavit is in some respects self-serving, he does admit to actions which certainly can be interpreted as unlawful and he accepts sole responsibility therefor. If McDuffie feels that he has no real defense, it would be reasonable for him to cooperate with the government in the

hope of reducing the charges against him. It does not seem likely that he would shrink from incriminating an accomplice if he in fact had one.

In short, appellant submits that if a jury had the benefit of McDuffie's testimony, and if the government could not show any persuasive reason why McDuffie would be willing to perjure himself and risk additional punishment on behalf of appellant, it would be extremely difficult for any jury to find appellant guilty beyond a reasonable doubt. For this reason the trial court should have granted appellant's motion for a new trial.

II

APPELLANT WAS DENIED A SPEEDY TRIAL AND WAS PREJUDICED BY THE DELAY

Appellant has appealed from the judgment of conviction and alleged that he was denied his Sixth Amendment right to a speedy trial. This Court has, sua sponte, consolidated that appeal, No. 22,329, with the instant case for all purposes.

In No. 22,329, appellant contends that delay of sixteen and onehalf months between arrest and trial creates a presumption of prejudice and appellant is entitled to have the indictment dismissed. At the time his brief was prepared

in No. 22,329, the record did not disclose any specific prejudice to appellant as a result of the long delay, although his then counsel did indicate to the court that he was disadvantaged by the absence of the co-defendant, Willie McDuffie.

In view of the subsequent re-appearance of McDuffie and nature of his testimony as set forth in his affidavit accompaning appellant's motion for new trial, it is clear beyond question that appellant was in fact prejudiced by the delay and resultant disappearance of McDuffie.

A delay of more than a year between arrest and trial raises a speedy trial claim of prima facie merit. Hedgepeth v. United States, 124 U.S. App. D.C., 291, 364 F.2d, 684 (1966). If, in addition, the defendant makes out a prima facie case of prejudice to his defense - "not necessarily showing conclusively that the defense was prejudiced, but at least making a showing of a reasonable likelihood of such prejudice, a showing not negatived by rebuttal of the prosecution" then the defendant is entitled to a dismissal of the indictment. Smith (Rozier) v. United States, D.C. Cir. Nos. 22,157 and 22, 158 (decided May 7, 1969).

In many respects the instant case is similar to that of Hinton v. United States, D.C. Cir. No. 22,068 (decided October 14, 1969). Hinton also claimed that he was prejudiced by the unavailability of a companion as a witness for the defense by the time trial was had. The companion had fled while awaiting trial on a non-related charge. Hinton asserted that the missing witness would have testified in such a manner as to absolve Hinton, while at the same time necessarily incriminating himself. The Court found the likelihood of this happening so remote that, under all the circumstances, the unavailability of the witness "did not ---generate a significant possibility of prejudice to the defense".

The critical difference in the cases, of course, is that in the instant case the missing witness definitely would have been willing to testify on behalf of appellant and would not have asserted his Fifth Amendment rights.

Appellant submits that he has made a showing of excessive delay, through no fault of his, plus a reasonable likelihood of prejudice to his defense, and he is therefore entitled to a dismissal of the indictment against him.

CONCLUSION

The convictions below should be reversed and the case remanded with instructions to dismiss the indictment or, in the alternative, to grant a new trial

Respectfully submitted

John L. Ridge, Jr.
1511 'K' Street, N.W.
Washington, D.C., 20005
Counsel for Appellant
(appointed by this Court)